THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE

INTERNATIONAL CHAMBER OF COMMERCE

CASE No. EXP/470/ICANN/87

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

ENTERTAINMENT NAMES INC.

(BRITISH VIRGIN ISLANDS)

(Consolidated with Cases No.

CASE No. EXP/462/ICANN/79
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
CHARLESTON ROAD REGISTRY INC. (USA)
and
EXP/463/ICANN/80
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
DOT MUSIC LIMITED (GIBRALTAR)
and
EXP/467/ICANN/84
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs.
DOTMUSIC INC. (UAE)
and
EXP/477/ICANN/94
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM) (USA) vs/
VICTOR CROSS, LLC (USA))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

EXP/470/ICANN/87

gTLD in issue: .MUSIC

Nature of Objection: Community

American Association of Independent Music ("A2IM")

Objector

-v-

Entertainment Names Inc.

Applicant

The Parties and their Representation

The Objector: American Association of Independent Music (A2IM) of 132 Delancey Street, 2nd Floor, New York, New York 10002, USA, rich@a2im.org

represented by Constantinos Roussos of DotMusic, 950 S. Flower Street #1404, Los Angeles, CA 90015, USA, costa@music.us, and Jason Schaeffer of ESQwire.com P.C., 1908 Route 70 East, Cherry Hill, NJ 08003, USA, jschaeffer@esqwire.com

The Applicant: Entertainment Names Inc. of Craigmuir Chambers Road Town, Tortola, -VG 1110, VG British Virgin Islands, tas.minds.machines.3@gmail.com

represented by Reg Levy of Minds + Machine, 3100 Donald Douglas Loop North, Hangar 7, Santa Monica, CA 90405, USA, reg@mindsandmachines.com

The Panel

The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL, Endsleigh Gardens, London WC1E 0EG, UK, rjacob@ucl.ac.uk, appointed on 19th June 2013, file transferred to me on 12th August 2013 shortly after payment of relevant fees.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its application for the gTLD .music on 13th June 2012 (ID 1-994-99764). The Objection was lodged on 13th March 2013 and the Response on 22nd May 2013.

2. On 7th May 2013 the International Centre for Expertise of the ICC ("Centre") consolidated this case with cases EXP/462//ICANN/79 (*A2IM v Charleston Road Registry Inc.*), EXP/463/ICANN/80 (*A2IM v Dot Music Limited*), EXP/467/ICANN/84 (*A2IM v DotMusic Inc.*) and EXP/477/ICANN/94 (*A2IM v Victor Cross, LLC*) because the applied for

string, .music, and Objector were the same in all cases. The effect of consolidation is not to make evidence in one case evidence in all – it is merely to ensure consistency and achieve some time savings. I must give a separate decision in relation to each case based on the evidence and submissions in that case.

3. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

4. On 12th August 2013the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 16th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here. If nonetheless I decided to admit the new material it sought a right of reply.

5. By my interim ruling of 21st August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77) and to admit it on the facts of this case. On 6th September 2013 the Applicant duly submitted a "Sur-Reply" with supporting annexes.

6. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook. I collectively call these "the Rules" but where appropriate will identify the particular rule concerned.

7. Much more specifically the Rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

(1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and

(2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

8. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether this or any of the other applicants in the consolidated cases should be awarded the gTLD .music. My task is more limited: to decide whether the Objector has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is successful in the case concerned. If not then it will be for other procedures within ICANN to determine what happens. I am not concerned with these.

Who the parties are and what they do or propose to do

The Applicant

9. The Applicant is a BVI corporation. It does not state in its answer to questions in the Application form that it is either a subsidiary company or has a joint venture partner. The Response is submitted by a company called Top Level Domain Holdings Limited ("TLDH"). Footnote 116 of the Objection refers to a webpage which indicates that this company is the parent company of "Minds + Machines" which is named as the Applicant's Representative. It seems safe to assume therefore that the Response is filed with the Applicant's authority and all the more so since the Objector does not question that. It also seems that TLDH will provide the technical services for the Applicant.

10. In its Application the Applicant says (I apologise for length but it is not easy to summarise):

> Background
>
> Music has a central importance to practically every person on earth. Every culture has its own form, its own style and it is a fundamental part of human communication and development.
>
> The word "music" however, while it defines this universally human creation, has a far narrower utility when applied to the Internet. The word "music" is a functional link between consumers, creators and the businesses that support them. Consumers seek out songs, creators seek out their audience and businesses seek out their customers and the word music plays a central role in this process of discovery and commerce. In addition to this music has fueled the growth of consumer products and online

businesses through association and as content for the products they sell.

Every country that is connected to the Internet will have a music business with individuals able to consume music in a variety of ways including passive listening, on demand streaming, downloading (illegal and legal) and ecommerce. This process of engagement is ever evolving with new participants appearing constantly. Traditional trade and consumer groups have found it difficult to control the flow of content and there has therefore arisen a tension between owners of music intellectual property, consumers and the technology businesses that enable this flow.

Central to this is the fact that there is little organization of the data that drives publication and distribution of music content. We believe that because at present there is no specific TLD for music it is difficult for artists to be consistently recognized and their music and trademarks to be properly safeguarded. While social media such as MySpace and Facebook have primarily played this role the actual identifier that links the artist or business to their association with music and the websites that represent them is often awkward, confusing, inaccurate and for consumers not trustworthy.

The .MUSIC TLD will offer to this group of creators, businesses and organizations an important identifier that can help serve to offer a safe, trustworthy, legitimate, consistent and universally recognizable anchor point for their music related activities. From a competitive perspective this group of potential registrants has little choice beyond social media URLs such as MYSPACE.COM/BANDNAME or BANDNAMETHEBAND.COM or BANDNAMEMUSIC.COM. In addition, music fans whose passion extends to wanting to identify with their love of music via a website or email address will want to have the .MUSIC TLD to show their commitment to music. At present there is no compelling way on the Internet to do this.

We hope to provide .MUSIC names to artists, record labels, publishers, major brands and music fans. Considering the existing competition from simple Google search, Facebook, MySpace, Bandcamp and others we believe that we can safely achieve 50,000 registrants for the .MUSIC TLD in by year 2.

Purpose

The purpose of the .MUSIC TLD is to:

* Provide a trusted TLD for musical artists, trade and union organizations, record labels, publishing companies, music distribution and marketing companies, DSPs, consumer brands, and music fans that will bring security, convenience, trust and efficiency to their music related activities.

* Provide a trusted and convenient identifier for artists and businesses that will enhance consumers ability to discover and legitimately consume music through e-commerce and broadcast platforms.

* Provide a mechanism whereby artists intellectual property will have a higher level of protection whereby industry professionals with a long history of defending music owners rights will be managing the distribution of the .MUSIC TLD.

* Provide a more organized means for the commercial consumption and distribution of music by way of a .MUSIC identifier.

* Provide the above mentioned groups with a compelling new choice for a domain name identifier at a competitive price.

* Provide music fans with the chance to personally identify with music on the Internet.

Our Mission is:

* To promote the legitimate and efficient exchange and consumption of music by making the domain names ending in .MUSIC available to all who may want to use .MUSIC domain names for their own artistic, commercial, business or personal or other legal purposes.

* To help safeguard the legal consumption and distribution of music and to give consumers safe and legitimate means for music discovery.

* To promote the music industry in general by having information of any and all types and for any and all legal purposes available and disseminated from websites and email addresses ending in .MUSIC for the registrants and users own purposes worldwide.

* To give to artists and the businesses that support them the tools to promote their brands through an easily identifiable website name and email address ending in .MUSIC.

* To give to global and local consumer brands the tools to promote their brand's association with music through an easily identifiable website name and email address ending in .MUSIC.

* To increase the choice that is offered to artists and businesses in how they market their music and brands and protect their intellectual property.

* To give music licensing and collection businesses additional tools to help maximize the rightful collection and distribution of royalties to artists through a more consistent mechanism for identifying artists and their performances.

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

A .MUSIC domain will help local and international MUSIC performers, composers and enthusiasts to associate themselves with music. Also, because music is such a popular human art, a .MUSIC top-level domain will increase sales and visibility which [this sentence is not completed in the original]
PUBLIC BENEFIT

We believe that the Internet-using world will benefit from the existence of a .MUSIC gTLD by:

- making domain names ending in .MUSIC available to all those who may want to use such .MUSIC domain names for their own business, personal, political or other legal purposes in the United States and world-wide.

- the promotion of music by having information of any and all types and for any and all legal purposes available and disseminated from websites and email addresses ending in .MUSIC for the registrants' and users' own purposes world-wide.

- the promotion of MUSIC by allowing businesses, not-for-profits and individuals to associate their products, services, information and selves with MUSIC for their own purposes.

- allowing people and organizations to promote their association with music on the Internet.

- providing an identifiable means for people, organizations and businesses to communicate with those who associate with or provide music.

EXPANDING THE TLD NAMESPACE

Over the past decade, the market for domain name registrations has grown at a tremendous pace. From 2000 to 2010 domain name registrations increased from 40 million to 200 million domain names registered globally. 2011 experienced a growth of approximately 9%, which was significantly higher than the previous year's 6% growth, ending third quarter 2011 with approximately 220 million domain names registered globally. Approximately 60% of these are gTLDs, while the remaining 40% are comprised of ccTLDs. More specifically, gTLD growth was approximately 8% in 2011, while ccTLD growth exceeded 11%.

Existing TLDs, such as .COM and .NET, do not provide adequate solutions for many registrants. Domain names that relate to the registrants' business, interests, or associations are often already registered, priced exorbitantly high, or available options are unsuitable. Additionally, other options, such as ccTLDs, do not provide adequate alternatives as a registrant may not have any geographic relation or meet the criteria associated with other gTLDs such as .MUSEUM or .AERO. Therefore, the only available opportunity to pursue a relevant and useful domain name registration may be through a brand new registration of a gTLD.

Taking into account the new opportunities available with new gTLDs, growth is expected to continue in all sections of the domain name industry. It will benefit registrants and users by allowing registrants to reach more targeted audiences and increase their web presence. Additionally, it will allow registrants to more closely identify with a particular market segment.
At present, there is no specific .MUSIC domain name, or useful top-level alternative domain name, that exists for the people, organizations or businesses that associate themselves with music or people, organizations or businesses that want to

communicate with them. Those desirous of a domain name that indicates some level of association with music could seek a second level domain name such as "MUSIC.COM," "MUSIC.US" or "MUSIC.NET," but such domains (or similar names) are not readily available under the limited number of existing gTLDs, and--more importantly--only provide a secondary (at best) or weak (at worst) relationship between the domain name and MUSIC, which we believe is the primary goal of the registrant of such names.

From a competitive perspective, registrants that want a domain name that effectively and efficiently shows an association with music or registrants that want a domain name that allows them to identifiably communicate with people who associate or identify with it face a domain name marketplace that provides them with few, if any, options for their purposes. The .MUSIC top-level domain will resolve this problem by providing registrants with an efficient, effective, prominent, instantly understood way of showing their association with music, and provide those registrants who desire it a domain that that can effectively communicate information to such Internet users in an identifiable way. At the same time, .MUSIC provides competition with the existing TLDs and new gTLDs that will be approved by ICANN, benefiting the Internet community at large by increasing consumer choice.

We believe that the .MUSIC top-level domain will add significantly to competition and differentiation in the top-level domain space, both for registrants and Internet consumers. With respect to competition, registrants are presently extremely limited in their choice of domain names that allow them to efficiently and effectively associate themselves with music. The availability of useful, effective, straight-forward domain names on existing top-level domains, such as .COM, .NET and .ORG, are few and far between, or may be for sale at prices that are out of reach for most. .MUSIC will allow registrants to obtain useful, effective, straight-forward domain names rather than be forced to purchase, for example, their fifth, sixth or even later choice .COM or .NET name--which may well barely relate to the registrant's purpose--or use of a domain name that may be confusingly similar with numerous other .COM or .NET domain names. In addition, some existing generic top-level domain names, though newer, such as .XXX, may be inappropriate for most registrants for content associational reasons, while country-code top-level domains, though numerous, are not useful or appropriate for many registrants for geographical associational reasons. Thus, .MUSIC will increase competition for registrants who want a domain name that clearly, effectively and efficiently associates them with MUSIC for their domain name purposes as well as for those registrants who want to reach Internet users who identify with it.

.MUSIC will also increase pricing competition in the top-level domain name space by assuring that .MUSIC domain names are priced at levels that are appropriate to the vast majority of potential registrants to whom .MUSIC is targeted.

Internet consumers benefit from this increase in competition, as less confusing and clearly associated .MUSIC domain names will make it easier for them to know that the owner of the second-level domain name is a member of or seeks to associate with MUSIC.

Likewise, .MUSIC will help significantly increase differentiation in the top-level

domain space. Existing leading generic top-level domain names, such as .COM, .NET and .ORG no longer require and no longer represent any real differentiation in association, purpose or content. Newer top-level domains, such as .XXX, .AERO and .MUSEUM, do represent differentiation, but are either inappropriate or unavailable to most prospective registrants at whom .MUSIC is targeted. .MUSIC will further increase differentiation by allowing registrants to be associated, and consumers to know that the registrant seeks to associate with music.

In terms of user experience, .MUSIC will provide users with a top-level domain name that allows them to easily recognize that the registrant seeks to have its second-level domain name and content associated with music. We believe this will be of substantial benefit to the Internet user community in generally--and the music industry specifically--as it will allow them to more easily and more readily understand the purpose or motives of the registrant's website or email, allowing for better, more efficient and more effective use of their time online.

On balance, and for the reasons set forth above, a .MUSIC domain will be in the public's interest; it will serve as a catalyst to promoting music; and it will benefit the music industry.

The Objector

11. The Objector is the American Association of Independent Music ("A2IM"). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

> The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.
>
> A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry's market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents' interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

12. The website indicates the sort of activities undertaken. It says:

> During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which

include education on issues, networking & presentation events, special offers and general business advice.

13. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others. And it has a general "mission statement" which includes passages such as:

> **"Fair Trade**
>
> A primary A2IM objective is to help independently owned music labels achieve commercial terms on par with the major recording companies. The association will constantly seek to level the playing field.
>
> **New Technology and Distribution**
>
> A2IM will relentlessly pursue a seat at the table for the launch of new technologies and distribution channels.
>
> **Access to Media**
>
> Independent music is underrepresented on mainstream radio and television. A2IM shall be a constant reminder to media broadcasters and elected officials that the ownership of the airwaves stem from the public trust and that cultural diversity is in the public interest and that the fair and equitable treatment of independent music creators will benefit the very media companies that would overlook or under-estimate the value of this content.
>
> **Legislative**
>
> A2IM will represent the Independent sector's interests in government and legislative issues.
>
> A2IM will be visible on issues where our position diverges from that of the majors, and for which the Independents need a central voice".

14. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is "the presence of a formal charter, or national or international registration".

15. A2IM has two sorts of member: "Labels" and "Associate Members". Labels are what in the pre-digital world were called "record companies". They are still so called though

of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called "Indies", that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to companies that "work with, rely upon, or otherwise support independent labels". There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM's Objection is being conducted by Mr Constantinos Roussos whose own company is itself seeking the gTLD .music. This is not without significance for it makes plain that A2IM does not object to the gTLD .music in principle, merely to this Application and those in the other .music cases I have to decide. That is not fatal to the Objection for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care. And it means that A2IM cannot contend (as indeed it does not) that a .music string is inherently objectionable – that no-one should have it.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April2013 Beijing Communique of the GAC (Government Advisory Committee) to ICANN:

> "Consumer Protection, Sensitive Strings, and Regulated Markets:
>
> The GAC Advises the ICANN Board:
>
> • Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:
>
> 1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.
>
> 2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

> 3...
>
> 4. Establish a working relationship with the relevant regulatory, or industry self---regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.
>
> 5...
>
> In the current round the GAC has identified the following non---exhaustive list of strings that the above safeguards should apply to:
>
> • Intellectual Property
>
> Here are listed a number of strings. .music is one of them.

18. What difference does this make to this case? The GAC has not said that .music should not be allowed at all (as it has in the case of some other strings). Nor has ICANN yet taken any action on the advice. Whether it does or not does not appear to me to matter. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when "enacted" in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a Community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the late material which I admitted does not relate to new facts. It, along with the responsive Additional Written Submission, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant contends that the Objector has failed to prove any aspect of the standing requirement, namely that an Objector must be "an established institution associated with a clearly delineated community." It says that the Objector is not an *established institution,* that there is no such thing as a *clearly delineated* music community and if there is the Objector is not associated with it.

23. I would add that the first test for a successful opposition overlaps with the test for standing. For the first test requires that the "community invoked by the objector is a clearly delineated community."

Is A2IM an established institution?

24. In considering whether an institution is established the Rules (specifically Guidebook rule 3.2.2.4) provide the following guidance:

> Factors that may be considered in making this determination include, but are not limited to:
>
> • Level of global recognition of the institution;
>
> • Length of time the institution has been in existence; and
>
> • Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

25. A2IM has been in existence since 2005. It was not formed as having anything to do with domain names but to act as an industry association for small American record companies. The Objector compares A2IM with "other, larger music-industry trade groups such as the RIAA and ASCAP." It says, unchallenged in the Response, that "The RIAA is the leading recording industry trade group in the United States and its prominence extends internationally. ASCAP is the world-wide leader in performance royalties for artists and rights holders". The suggestion is that because A2IM is not as established as these other larger and older organisations it cannot be regarded as established.

26. I reject that. Although its membership (I here exclude associate membership) is essentially American and does not even consist of the majority American Indie labels, to my mind A2IM is, on balance, to be regarded as established. There is no reason to suppose its existence is precarious despite its small size; its voice is clearly at least listened to by at least the US Government and policymakers in the US. The US market is important globally and it would be fanciful to hold that A2IM has no recognition whatever outside the US.

A music community?

27. The Applicant says there is no such thing. I accept that submission. There is a vast range of different types of music in the world. The Applicant puts it graphically when it says: Mozart's Requiem in D Minor (1791) and Skrillex's Scary Monsters and Nice Sprites (2010) are very different and one might not have been considered "music" in the time of the other. That both count as "music" is proof of the lack of heterogeneity within the term "music."

28. Music appeals to nearly all mankind. Just because there is one word covering all kinds of music does not make all mankind into a "music community" – the word will not stretch that far. There is no cohesion or relationship between all those concerned with creating performing, recording or "consuming" music of all the different sorts known to mankind. There is no public recognition of such a thing as the "music community." There are no boundaries, formal or informal for what it might be and how one says someone is within it or without it.

29. I am not at all clear what A2IM says the music community is. It refers to the "independent music community" or "sector" meaning independent music labels, but that cannot possibly constitute a global music community as a whole. In other places it invokes all its members and associate members. But even if you took them all as being a "community" (which I do not) they could only form a part of the global citizenry (nearly all mankind) which has an interest of any sort in music of any sort. In its additional submission A2IM suggests that the community consists of its membership in the context of the clear delineation requirement. But A2IMs membership (even taken as a whole) cannot in any way be taken to amount to a global music community for all mankind.

"Clearly delineated"

30. As for a music community which is "clearly delineated" the Objector is in an even worse position. The supposed community is formless – there are no boundaries, formal or informal for it – how one says one person is within it and another without.

31. A2IM does not focus on "clear delineation" save in its additional submission. As I have said there it suggests delineation by virtue of membership of A2IM. True it is that membership or not provides a clear delineation of some sort, but it is not a clear delineation of those targeted by the proposed gTLD, not the right sort of "clear delineation."

Association

32. The only direct association A2IM has is with its members. It invokes an association (which has to be an "ongoing") with a clearly delineated community via its members and associate members – in short it claims association in a representative capacity. It says its members have the necessary association and it can invoke that association because it represents its members and acts as their agent or spokesman.

33. That raises the question of to what extent A2IM has authority to represent its members, either full or associate, and in relation to what. Only if it has their authority to speak for them in relation to this dispute can it invoke the relationships its members may have with the target of the proposed gTLD.

34. I do not think it is proved that it has any such authority. I have drawn attention to the absence of any formal document setting out A2IM's general authority. The fact that it has spoken in relation to some other matters (as recounted on its website) does not cloak it with authority to speak for all its membership about all matters. I cannot infer from what it has done that A2IM has authority to speak for all its members in relation to gTLDs.

35. Indeed there is evidence pointing the other way. For A2IM sought support from its members. Only a minor proportion of these were willing to write letters of support (the letters form Appendix H to the Objection, although the Objection itself refers to Exhibit A). And as regards that minor proportion I am not satisfied that have any real objection to this particular objection – none of the letters indicate much more than general concern about what might happen if there is mismanaged .music gTLD. None of the letters indicate that the author has even read the Application form.

36. As to A2IM's associated members, whilst they very probably support some of the work which A2IM does, I cannot see that merely by becoming an associate member a party thereby confers on A2IM authority to speak for it in relation to any specific matter and specifically for this Objection. It is unthinkable, for instance, that A2IM has authority to speak for major corporations such as Apple (iTunes) or Spotify about anything.

37. I conclude that A2IM does not have any sufficient association with the invoked community, even if that be Indies or its own members, still less with the record industry as a whole and even less with the targeted "community".

38. I therefore hold that A2IM lacks standing for all the above reasons. The Applicant therefore prevails.

Further Observation

39. Even if that were wrong, I am satisfied that the Objector has failed to make out the detriment test, namely whether:

> "the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted."

Significant portion

40. The string is targeted at anyone interested in music – nearly the whole world. One can envisage a subset consisting those who might want a .music address - say those who are interested professionally in music. Even so the class is huge, going much wider than the recording industry of the world. Is any significant portion of that subset, or even of the world recording industry, likely to suffer a material detriment to its rights or legitimate interests?

41. I think the answer on the evidence is clearly no. Only 18 label members (out of 210 in all) wrote supporting letters – 8.5%. They are of course a much smaller proportion of the world Indie population and still less of the world record company industry. They do not amount to a significant portion of the community targeted.

Material detriment

42. As I have said I am not satisfied even those who wrote in support demonstrate any real objection to this particular application or indicate why it would cause them material detriment.

43. The gist of the letters of support is that if .gTLD is not well managed or has no proper controls it may attract applicants who act illegally and in particular infringe or facilitate infringement of copyright. The Applicant clearly disavows allowing this (see its application). And if this fear were really well founded the entire world record industry would be up in arms – majors and Indies alike have a common interest in the suppression of piracy. The absence of a universal clamour makes it clear to me that the record industry as a whole does not fear material detriment. Its likelihood is not proved. This is an independent further reason for dismissing the Objection.

Costs

44. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings, the Dispute Resolution Service Provider shall refund to the prevailing party, as determined by the panel, its advance payment in costs. The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

45. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The American Association of Independent Music's Objection is dismissed and the Applicant, Entertainment Names Inc., prevails.

2. Entertainment Names Inc. is entitled to refund of its advance payment of costs by the Centre pursuant to Art. 14(e) of the Procedure.

Date: ....18th Febry 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An "established institution associated with a clearly delineated community" may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-

governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

• Statements contained in application;

• Other public statements by the applicant;

• Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

• Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;

• Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;

• Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;

• Dependence of the community represented by the objector on the DNS for its core activities;

• Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and

• Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.